Nos 01-9014 and 02-9001

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

E-Transmission
Signature to follow

MUMIA ABU-JAMAL,
APPELLEE IN No. 01-9014 and *APPELLANT IN No. 02-9001*
v.
MARTIN HORN, PENNSYLVANIA DIRECTOR OF CORRECTIONS, *et. al.*
APPELLANT IN No. 01-9014 and *APPELLEE IN No. 02-9001*

BRIEF OF *AMICUS CURIAE* THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEE/CROSS-APPELLANT'S PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

JOHN PAYTON
Director-Counsel and President
CHRISTINA A. SWARNS
JACQUELINE BERRIEN
DEBO P. ADEGBILE
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, N.Y. 10013
212-965-2200 (Phone)
212-219-2052 (Fax)

Attorneys for *Amicus Curiae*
The NAACP Legal Defense and Educational Fund, Inc.

Dated: June 27, 2008

STATEMENT OF COUNSEL UNDER FRAP 35(b)(1) AND LAR 35.1

I express my belief, based upon reasoned and studied professional judgment, that the Panel Majority's ruling conflicts with *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, by contradicting *Batson*'s dictate that courts reviewing claims of discrimination in the exercise of peremptory challenges consider "all relevant circumstances," by undermining *Batson*'s conclusion that one discriminatory strike violates the Constitution, by failing to offer any recourse for compelling evidence of discrimination, and by improperly elevating *Batson*'s *prima facie* case burden. I also express my belief, based upon reasoned and studied professional judgment, that this case involves questions of exceptional importance, and that consideration by the full Court is necessary to secure uniformity of this Circuit's decisions.

Respectfully submitted,

JOHN PAYTON
Director-Counsel and President
CHRISTINA A. SWARNS
JACQUELINE BERRIEN
DEBO P. ADEGBILE
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, N.Y. 10013
212-965-2200 (Phone)
212-219-2052 (Fax)

STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* files the following statement of disclosure: The NAACP Legal Defense & Educational Fund, Inc., is a nonprofit 501(c)(3) corporation and is not a publicly held company that issues stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

MISCELLANEOUS

A divided panel of this Circuit has affirmed the District Court's partial denial of habeas relief in this capital case. *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008). *Amicus Curiae* respectfully submits this brief in support of Mr. Abu-Jamal's *Petition for Panel Rehearing and Suggestion for Rehearing En Banc*. For the reasons stated in Mr. Abu-Jamal's submission and herein, rehearing should be allowed.[1]

INTEREST OF AMICUS CURIAE

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation formed to assist African Americans in securing their rights through in-court litigation. LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. We therefore represented the defendants in, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Comm'n of Greene County* , 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Miller-El*

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[1]The Panel Majority's opinion is cited as "Panel Majority Op." followed by the Federal Reporter page number. Judge Ambro's dissenting opinion is cited as "Panel Dissent Op." followed by the Federal Reporter page number. Appellant/Cross-Appellee are referred to as "the Commonwealth." Appellee/Cross-Appellant is referred to by name. Transcripts of state court proceedings in Pennsylvania are known as "Notes of Testimony" and cited as "NT" followed by the date and page number. All emphasis is supplied unless otherwise indicated.

v. Dretke, 545 U.S. 231 (2005), *Johnson v. California*, 545 U.S. 162 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), and *Georgia v. McCollum*, 505 U.S. 42 (1992). In addition to our jury discrimination work in the United States Supreme Court, LDF was counsel of record in *Wilson v. Beard*, 426 F.3d 653 (3d Cir. 2005) and submitted an *amicus* brief and presented oral argument before the three-judge Panel in the instant matter. Given its expertise, LDF believes its perspective would be helpful to this Circuit in resolving the issues presented in this case.

STATEMENT OF THE CASE

In 1982, Mumia Abu-Jamal was convicted of first degree murder and sentenced to death by a jury for the shooting death of a police officer in Philadelphia, Pennsylvania. Mr. Abu-Jamal is entitled to an evidentiary hearing on his claim of discriminatory jury selection because he has "produc[ed] evidence sufficient to permit the [court] to draw an inference" that the trial prosecutor intentionally used his peremptory challenges to exclude prospective jurors of color. *Johnson*, 545 U.S. at 170. *See* Panel Dissent Op. at 318. In rejecting Mr. Abu-Jamal's claim, the Panel Majority undermined the purpose and intent of *Batson v. Kentucky* by marginalizing relevant and credible evidence of discrimination and thereby allowing apparent discrimination to go unchecked.

Mr. Abu-Jamal has presented substantial evidence indicating that his trial prosecutor intentionally used his peremptory challenges to exclude prospective jurors of color. Specifically, Mr. Abu-Jamal has asserted that he "is black, and therefore 'a member of a cognizable racial group;'" "that the prosecutor exercised peremptory challenges against black prospective jurors;" and that "'peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate.'" Panel Dissent Op. at 315-316 (quoting *Batson*, 476 U.S. at 96).

Mr. Abu-Jamal has also established that "the prosecutor exercised 15 peremptory strikes, 10 of which were used to remove black venirepersons. That means that the 'strike rate' for blacks was 66.67%. As the Supreme Court has noted, '[h]appenstance is unlikely to produce this disparity.'" Panel Dissent at 316 (citing *Commonwealth v. Abu-Jamal*, No. 1357, 1995 WL 1315980, at *103 (C.P.Ct.Phila.Cty. Sept. 15, 1995); quoting *Miller-El*, 537 U.S. at 342)).

Mr. Abu-Jamal has additionally demonstrated that "this was a racially charged case,[2] involving a black defendant and a white victim;" that "[Mr.] Abu-Jamal was

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[2]As detailed in LDF's *amicus* brief before the Panel in this matter, in the months between the incident and the trial, local media continually highlighted the following racial aspects of the case: Mr. Abu-Jamal was an African-American community activist and a member of and/or advocate for African-American organizations; as a reporter, Mr. Abu-Jamal worked for African-American media

a member of the Black Panther Party;" that "he was charged with killing a police officer;" and that "this is a capital case." Panel Dissent Op. at 318-319.

Finally, Mr. Abu-Jamal has shown that the trial prosecutor's pattern of striking prospective jurors of color was consistent with that of prosecutors around the country before *Batson*,[3] was reflective of the common practices of the Philadelphia County

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outlets and/or focused on African-American issues; Mr. Abu-Jamal wore his hair in dreadlocks; Mr. Abu-Jamal demonstrated interest in and/or involvement with the Rastafarian religious-cultural movement; Mr. Abu-Jamal was born Wesley Cook but changed his name; prior to his arrest, Mr. Abu-Jamal made public statements regarding the rights and experiences of African Americans; African-American organizations established and/or supported a defense fund for Mr. Abu-Jamal; and members of the Philadelphia-based, African-American organization, MOVE, attended the court proceedings and supported Mr. Abu-Jamal's defense. *See Brief of Amicus Curiae The NAACP Legal Defense and Educational Fund, Inc., In Support of Appellant Seeking Reversal, In Part, of the District Court's Order* at 12-16 (citations omitted).

[3]*See Batson*, 476 U.S. at 103 (Marshall, J. concurring) ("Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant.").

District Attorney's Office,[4] and was expressly authorized by the Pennsylvania Supreme Court. *See Commonwealth v. Henderson*, 438 A.2d 951, 953 (Pa. 1981).

Although this combination of evidence amply "clear[s] the low *prima facie* hurdle of the *Batson* analysis," Panel Dissent Op. at 317, the Panel Majority concluded that Mr. Abu-Jamal could not set forth a *prima facie* case of discrimination absent documentation of the "'exclusion rate'" – a "compari[son of] the percentage of exercised challenges used against black potential jurors with the percentage of black potential jurors known to be in the venire." Panel Majority Op. at 290. The Panel Majority reached this conclusion despite the fact that that *Batson*'s *prima facie* case burden is low, that *Batson* directs courts confronted with claims of discriminatory exercise of peremptory challenges to consider "all relevant

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[4] *See, e.g.*, NT 3/18/82 at 12 (counsel for Mr. Abu-Jamal noting that in his experience, the Philadelphia County District Attorney's Office consistently used its peremptory challenges to exclude African American prospective jurors); NT 7/28/95 at 208-09 (same); *Commonwealth v. Brown*, 417 A.2d 181, 186 (Pa. 1980) (defense attorney noting Philadelphia County District Attorney's Office's persistent use of peremptory challenges against African Americans); *Diggs v. Vaughn*, 1991 WL 46319, *1 (E.D. Pa. March 27, 1991) (crediting testimony by Philadelphia lawyers regarding Philadelphia prosecutors routinely using peremptory challenges to exclude African-Americans); *Miller-El*, 545 U.S. at 268 (Breyer, J., concurring) (noting that an extensive study of peremptory strikes in Philadelphia found that "in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51% of black jurors and 26% of nonblack jurors" with the racial disparities being higher before *Batson* than after); *Wilson*, 426 F.3d at 655 (finding *prima facie* case and error based, in part, on videotaped training tape wherein a Philadelphia prosecutor "repeatedly advises [the] audience to use peremptory challenges ... in apparent violation of *Batson*.")

circumstances," *Batson*, 476 U.S. at 96, that this Circuit has previously declared that "*Batson* does not place the burden on the petitioner to develop a full statistical accounting" at the *prima facie* case stage, and that this Circuit "ha[s] relied on the strike rate alone despite the absence of other contextual markers" in finding *Batson* error. Panel Dissent Op. at 317, 318.

The Panel Majority summarily dismissed Mr. Abu-Jamal's substantial evidence of intentional discrimination with a conclusory footnote declaring that "Abu-Jamal has not demonstrated that these allegations make the Pennsylvania Supreme Court's decision objectively unreasonable." Panel Majority at 291 n.17. By focusing solely on exclusion rate and by giving Mr. Abu-Jamal's abundant evidence of discriminatory intent only "cursory consideration," the Panel Majority "misapplie[d] *Batson*, ... [by] fail[ing] to 'consider all relevant circumstances' of [the] case." Panel Dissent Op. at 319.

Amicus believes that rehearing is warranted because the Panel Majority's decision undermines and contradicts *Batson*.

ARGUMENT

Batson's Low *Prima Facie* Case Burden Can Be Met By Relying on "All Relevant Circumstances"

As detailed in LDF's prior *amicus* brief in this matter, the Supreme Court developed the *Batson* test to lower the "crippling,"*Batson*, 476 U.S. at 92, and "unworkable," *Miller-El*, 545 U.S. at 239, burden of proof that was imposed by *Swain v. Alabama*.[5] Because defendants alleging discrimination in jury selection were overwhelmingly unable to meet *Swain*'s extremely high threshold burden of proof, the "misuse of the peremptory challenge to exclude black jurors" became "common and flagrant." *Batson*, 476 U.S. at 103 (Marshall, J. concurring).

In order to curb these abuses, the *Batson* Court declared "inadequa[te]" "any burden of proof for racially discriminatory use of peremptories that requires that 'justice ... sit supinely by' and be flouted in case after case before a remedy is available." *Id.*, 476 U.S. at 102 (Marshall, J. concurring) (quoting *Commonwealth v. Martin*, 461 Pa. 289, 299 (1975) (Nix, J., dissenting)). Instead, *Batson* declared

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[5]Pursuant to *Swain*, a petitioner alleging the discriminatory exercise of peremptory challenges had to demonstrate that "the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Swain*, 380 U.S. at 223.

that courts confronted with claims of discrimination in the exercise of peremptory challenges, "must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Id.*, 476 U.S. at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)). It therefore announced the now familiar three-part test: first a defendant must set forth a *prima facie* case of discrimination; second, if the defendant meets his burden, the prosecutor must offer race-neutral reason(s) for the challenged strike(s); third, the court must determine whether the defendant has proven intentional discrimination. *See Miller-El*, 537 U.S. at 328-29 (citations omitted).

In order to ensure that its test did not suffer from the infirmities of *Swain*, the *Batson* Court made clear that petitioners claiming discrimination could not be saddled with a heavy evidentiary burden. *See, e.g., Johnson*, 545 U.S. at 170. Thus, the Court declared that to set forth a *prima facie* case of discrimination, a petitioner need only

> show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953) (internal citations omitted)). The Court also made clear that there is no specific formula required for establishing a *prima facie* case:

> [i]n deciding whether the defendant has made the requisite showing, *the trial court should consider all relevant circumstances. For example*, a 'pattern' of strikes against black jurors included in the particular venire *might* give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges *may* support or refute an inference of discriminatory purpose. *These examples are merely illustrative.*

Batson, 476 U.S at 96-97. *See also* Panel Dissent at 314 n.44. Thus, "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 128 S.Ct. 1203, 1208 (2008) (citing *Miller-El*, 545 U.S. at 239).

Consistent with this clear dictate, this Circuit has repeatedly rejected interpretations of *Batson* that place an undue burden on petitioners claiming discrimination in the exercise of peremptory challenges and has found that a variety of factors can satisfy *Batson*'s *prima facie* case burden. This Circuit has stated that "the question whether a *prima facie* case has been established must be judged based on all relevant circumstances; no rigid test need be satisfied; and in some cases, a *prima facie* case may be made out based on a single factor." *Brinson v. Vaughn*, 398 F.3d 225, 235 (3d Cir. 2005) (granting *Batson* relief and finding that a "stark pattern"

of peremptory challenges against black potential jurors was, in and of itself, "more than sufficient" to satisfy the *prima facie* case burden).[6]

This Circuit has also recognized that "there is no 'magic number or percentage [necessary] to trigger a *Batson* inquiry,' and that '*Batson* does not require that the government adhere to a specific mathematical formula in the exercise of peremptory challenges.'" Panel Dissent at 314-315 (quoting *Clemons*, 843 F.2d at 746). More specifically, this Circuit has declared that "[n]otably absent from the... *prima facie* case is any call for trial judges to seek ... [a] statistical accounting [of the race of the jury venire]" and that "requiring the presentation of such a record simply to move past the first stage in the *Batson* analysis places an undue burden upon the defendant." *Holloway v. Horn*, 355 F.3d 707, 728 (3d Cir. 2004) (finding a *prima facie* case based

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[6]*See also Wilson, supra* (finding a *prima facie* case – and *Batson* error – based on the trial prosecutor's disproportionate use of peremptory challenges to exclude prospective jurors of color and a videotape of the trial prosecutor making "a number of highly inflammatory comments implying that he regularly seeks to keep qualified African-Americans from serving on juries."); *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995) (finding a *prima facie* case and error after declaring that five factors relevant to a *prima facie* case are the number of racial group members in a panel, the nature of the crime, the race of the defendant and victim, a pattern of strikes against racial group members, and the prosecution's questions and statements during voir dire); *U.S. v. Clemons*, 843 F.2d 741, 748 (3d Cir. 1988) (noting that among the "relevant factors" to be considered in assessing the existence of a *Batson prima facie* case are "how many members of the 'cognizable racial group' ... are in the panel; the nature of the crime; and the race of the defendant and the victim").

solely on a pattern of strikes and noting that "a defendant's *Batson* objection ... can be based, for example, on a single strike accompanied by a showing that the prosecutor's statements . . . support an inference of discrimination.").

Thus, both the Supreme Court and this Circuit have made clear that *Batson*'s *prima facie* case burden is (and must be) low and can be satisfied through the presentation of "all relevant circumstances." *Batson*, 476 U.S. at 96.

The Panel Majority's Determination that a *Prima Facie* Case Requires "Exclusion Rate" Evidence Conflicts with *Batson* and Improperly Elevates the Step One Burden

The Panel Majority's pronouncement that "exclusion rate" evidence is a necessary component of a *prima facie* case contradicts *Batson*'s dictate to consider "all relevant circumstances" and its conclusion that one discriminatory strike violates the Constitution. It also undermines the intent of *Batson* by offering no recourse for cases presenting compelling evidence of discrimination. Because the Panel Majority has established a "burden of proof for racially discriminatory use of peremptories that requires that 'justice ... sit supinely by' and be flouted ... before a remedy is available," *Batson*, 476 U.S. at 102 (Marshall, J. concurring), this Court should grant rehearing and reverse.

First, the Panel Majority's declaration that Mr. Abu-Jamal cannot set forth a *prima facie* case of discrimination absent "exclusion rate" evidence flies in the face

of *Batson*'s express direction that courts should consider "any ... relevant circumstances" that raise an inference of discrimination, *Batson*, 476 U.S. at 96, and that "a 'pattern' of strikes against black jurors" as well as "the prosecutors questions and statements during *voir dire* examination and in exercising his challenges" can support a *prima facie* case of discrimination. *Batson*, 476 U.S. at 97. *See also Snyder*, 128 S.Ct. at 1208.

It also ignores the fact that both the Supreme Court and this Circuit have relied on a variety of factors – including the tracking of race by the trial prosecutor, a history of discrimination by the individual prosecutor and/or the prosecutor's office, jury shuffling, and comparative juror analysis – in evaluating *Batson* claims (and finding *Batson* violations) and the fact that neither court has suggested that any one particular category of evidence is required to successfully establish a *prima facie* case of discrimination. *See, e.g., Snyder*, 128 S.Ct. at 1211; *Miller-El*, 545 U.S. at 253-254, 263-264; *Wilson* 426 F.3d at 653; *Brinson* 398 F.3d at 225.

Thus, the Panel Majority's declaration that "exclusion rate" evidence is a necessary component of a *prima facie* case simply lacks constitutional support or circuit authority. With this decision, the Panel Majority subverts *Batson* by marginalizing evidence that the Supreme Court and this Circuit have expressly deemed to be relevant to the *prima facie* case assessment.

Second, by singling-out "exclusion rate" evidence and devaluing all other evidence of discrimination, the Panel Majority allows powerful indicators of racial discrimination to go unchecked and improperly raises *Batson*'s *prima facie* case burden. *See, e.g., Johnson*, 545 U.S. at 172 ("The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.").

As noted above, *Batson*'s initial burden of proof was intentionally set low because the imposition of a high standard allowed racial discrimination in jury selection to proliferate. *Batson*, 476 U.S. at 92-93. The Panel Majority's finding that without the "exclusion rate," the evidence upon which Mr. Abu-Jamal relied in order to establish an inference of discrimination – his own race (African-American), the race of the victim (white), the pattern of strikes against prospective jurors of color (10/15), Mr. Abu-Jamal's membership in the Black Panther Party, the fact that the decedent was a police officer, the fact that Mr. Abu-Jamal faced the death penalty, the fact that the trial prosecutor's pattern of striking prospective jurors of color was consistent with that of prosecutors around the country before *Batson*, the fact that the trial prosecutor's pattern of striking prospective jurors of color was reflective of the

common practices of the Philadelphia County District Attorney's Office, and the fact that the Pennsylvania Supreme Court expressly authorized the use of race-based peremptory challenges – was insufficient to meet the *prima facie* case threshhold unquestionably elevates *Batson*'s Step One burden because this Circuit has previously found error in cases presenting substantially less evidence of discrimination. *See, e.g., Simmons, supra.* By raising the bar in this way, the Panel Majority improperly insulates suspicious peremptory challenges from constitutional scrutiny.

Although the Panel Majority suggests that "there may be instances where a *prima facie* case can be made without evidence of the strike rate and exclusion rate," Panel Majority at 292, it's failure to articulate a method for determining which cases or combinations of facts overcome this vague hurdle renders the existence of this supposed gateway meaningless. The fact that Mr. Abu-Jamal's case – which, as previously noted, is *replete* with serious indicators of discriminatory intent – apparently fails to meet this unknown standard makes clear the extent to which the Panel Majority has raised the *prima facie* case bar and demonstrates that few cases will meet it.

Finally, the Panel Majority's single-minded focus on "exclusion rate" ignores the fact that *Batson* can be violated with a single strike. *Batson*, 476 U.S. at 99 n.22.

See also Snyder, 128 S.Ct. at 1208 (citing, *inter alia*, *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994); *Clemons*, 843 F.2d at 747). Under the Panel Majority's interpretation, there can be no meaningful recourse for a single discriminatory peremptory challenge.

CONCLUSION

En banc and panel rehearing are appropriate for the reasons stated herein and in Mr. Abu-Jamal's submission to this Circuit.

Respectfully submitted,

JOHN PAYTON
Director-Counsel and President
/s/ Christina A. Swarns
CHRISTINA A. SWARNS
JACQUELINE BERRIEN
DEBO P. ADEGBILE
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson St., 16th Floor
New York, NY 10013
212-965-2200 (Phone)
212-219-2052 (Fax)

Attorneys for Amicus Curiae

CERTIFICATIONS

1. Certification of Bar Membership

I hereby certify that I, Christina A. Swarns, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Certification of Word Count

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because it contains 5673 words, excluding the parts of the brief exempted by Fed. R.App.P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 9.0 in 14 point, Times New Roman font.

3. Certification of Service

I hereby certify that I e-mailed an electronic copy of the foregoing *Brief of Amicus Curiae the NAACP Legal Defense and Educational Fund, Inc. in Support of Appellee/Cross-Appellant's Petition for Panel Rehearing and Suggestion for Rehearing En Banc*, in a single .PDF file, to the Office of the Clerk, United States Court of Appeals for the Third Circuit at the following e-mail address: <electronic_briefs@ca3.uscourts.gov>.

I hereby certify that ten copies of the foregoing Brief have been deposited in the United States mail, postage prepaid and properly addressed to the Office of the Clerk, United States Court of Appeals for the Third Circuit, 21400 United States Courthouse, 601 Market Street, Philadelphia, PA 19106.

I hereby certify that two copies of the foregoing brief have been deposited in the United States mail, postage prepaid and properly addressed, to counsel for all other parties in this suit, as follows:

Robert R. Bryan, Esq.
Law Offices of Robert R. Bryan
2088 Union Street, Suite 4
San Francisco, CA 94123

Hugh Burns, Esq.
District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107

4. Certification of Identical Compliance of Briefs

I hereby certify that the electronic and hard copies of foregoing Brief in the instant matter contain identical text.

5. Certification of Virus Check

I hereby certify that a virus check of the electronic .PDF version of the foregoing Brief was performed using Symantic AntiVirus, and the .PDF file was found to be virus free.

Dated: June 27, 2008

/s/ Christina A. Swarns
CHRISTINA A. SWARNS
Attorney for Amicus Curiae
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson St., 16th Floor
New York, N.Y. 10013
212-965-2200 (Phone)
212-219-2052 (Fax)